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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1096-61

LEE E. A. PARKER,

Petitioner,

v.

CLARENCE T. GLADDEN,
Warden of the Oregon State Penitentiary,

Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT Y. THORNTON
Attorney General of Oregon

WAYNE M. THOMPSON
Assistant Attorney General
Supreme Court Building
Salem, Oregon 97310
Tel. 364-2171, ext. 315, 352

Attorneys for Respondent

JOHN H. SCHAFER
ARMAND DEFFNER
701 Union Trust Building
Washington, D.C. 20005
Attorneys for Petitioner

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# RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1093

LEE E. A. PARKER,

Petitioner,

v.

CLARENCE T. GLADDEN, Warden,

Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

### QUESTION PRESENTED

Where a bailiff, who is not a witness, makes statements referring to the accused as "Oh, that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," which are overheard by two jurors, but not by the other ten jurors, is due process of law violated if the jury renders an unanimous verdict of guilty and under the Oregon Constitution a verdict is sufficient if ten jurors concur in a verdict of guilty.

## STATEMENT

We accept the petitioner's statement of the case, except for the omission of the following material facts which we feel are pertinent to the issue raised.

The Supreme Court of Oregon based its decision on the following facts: "(1) During the trial, the bailiff stated to an alternate juror about the defendant, 'Oh, that wicked fellow, he is guilty.' This was overheard by a regular juror; (2) the bailiff told an unknown juror during the course of the trial, 'If there is anything wrong the Supreme Court will correct it.' This was overheard by two regular jurors . . . ." 407 P. (2d) 246, 247. The regular juror who overheard the first statement was one of the two regular jurors who overheard the second statement.

The post-conviction trial court held that these statements violated the provisions of *Ore. Rev. Stat.* § 17.305 (Appendix) and that if the matters alleged in the post-conviction petition had been called to the trial court's attention, that court on its own motion would have granted the petitioner a new trial. (Petitioner's Brief 3a & 6a)

The issue of the bailiff's misconduct was not raised at the trial, nor was the issue raised on the petitioner's direct appeal of his conviction. It was only after the Supreme Court of Oregon affirmed the petitioner's conviction on the direct appeal, that he had his wife contact members of the jury in an effort to find new grounds for setting aside his conviction. (P.C. Tr. 64-65)

One of the first jurors contacted was a Mrs. Inwards

who told the petitioner's wife that she was willing to discuss the verdict with Mrs. Parker and listen to a tape recording made by the petitioner. (P.C. Tr. 73) As it happened, Mrs. Inwards was the juror who had held out the longest in voting to find the petitioner not guilty. (P.C. Tr. 359) When asked by Mrs. Parker for the names of any other jurors who had taken the position that the petitioner was not guilty, before joining in the unanimous verdict of guilty, Mrs. Inwards gave her the name of Mrs. Drake, another regular juror, and a Mrs. Gattman, an alternate juror, who did not participate in the verdict. (P.C. Tr. 73-74) The reason Mrs. Inwards suggested that Mrs. Parker contact Mrs. Gattman was that she was sure that Mrs. Gattman would be willing to discuss the matter as she had been disappointed in the verdict. (P.C. Tr. 94)

After discussing the matter and listening to the petitioner's tape recorded statement, the women again discussed the matter with the petitioner's attorney and made affidavits alleging various acts of misconduct on the part of the bailiff. (P.C. Tr. 101-103, 168-169) These affidavits provided the basis for the petitioner's post-conviction action.

Mrs. Inwards testified that part of her statement in her affidavit was untrue. (P.C. Tr. 128 & 131) Her testimony was not only impeached by the State, it was also impeached by the petitioner's counsel when he tried to rehabilitate her testimony. (P.C. Tr. 141-143) In fact Mrs. Inwards' testimony at the post-conviction trial borders on being incomprehensible. Likewise, Mrs.

Drake was vague in stating exactly what she had overheard. (P.C. Tr. 166-168) It was only Mrs. Gattman, the alternate juror, who took no part in the deliberation, who was sure of what the bailiff had said. This is because it was her own statement which prompted the bailiff's remark of, "Oh, that wicked fellow, he is going to be - - he is guilty." (P.C. Tr. 174)

There was no evidence that any jurors other than Mrs. Inwards and Mrs. Drake, regular jurors, and Mrs. Gattman, an alternate, heard either of the alleged statements. Ten of the jurors, denied hearing the remark. (P.C. Tr. 192, 204, 211, 222, 231, 247, 257, 267, 272, 306) Even of the two regular jurors who did hear the remark, there is no reliable evidence that it influenced their decision. Mrs. Drake did not testify that it had any effect on her vote. It could not have had any effect on Mrs. Inwards as she was one of the jurors who held out longest on voting for conviction. (P.C. Tr. 359) She at first testified that the remark did not affect her (P.C. Tr. 103, 126, 141), only to change her testimony the next day to state that it did. (P.C. Tr. 355). Almost in the same breath with which she expressed this latter conclusion, she stated that her final vote of guilty had weighed heavily upon her conscience and she would do anything to correct it. (P.C. Tr. 365 & 368)

In reversing the post-conviction trial court, the Supreme Court of Oregon held that the court below had erroneously applied the statutory standard for judging a motion for a new trial. 407 P. (2d) at 247. The Oregon Post Conviction Act (*Ore. Rev. Stat.* § 138.530) (Ap-

pendix) provides that post-conviction relief will be granted when it is established that there was a substantial denial of the petitioner's constitutional rights which would render the conviction void. We would agree that the Oregon Supreme Court then went on to determine that neither the petitioner's federal nor state constitutional rights had been denied. 407 P. (2d) at 248.

It should further be noted that Art. I § 11, of the Oregon Constitution (Appendix) only requires an unanimous jury verdict when the defendant is found guilty of first degree murder. In all other cases it is sufficient if ten members of the jury concur in the verdict of guilty. In this case the undisputed evidence shows that ten members of the jury panel did not hear the bailiff's remarks and the jury returned an unanimous verdict finding the petitioner guilty of second degree murder.

## REASONS FOR NOT GRANTING THE WRIT

Contrary to the petitioner's contention, this case is clearly distinguishable from this Court's recent decision in *Turner v. Louisiana*, 379 U.S. 466 (1965).

In *Turner*, this Court held that a defendant was denied his constitutional right to a fair trial where two deputy sheriffs had acted in the dual roles of principal prosecution witnesses and at the same time were responsible for the custody of the jury during the course of the trial. Because of the "continuous and intimate association" between the deputies and the jurors, there existed in *Turner* the possibility that the deputy sheriffs may have related information outside of the courtroom

which affected the jury's verdict. Even if the deputy sheriffs did not discuss the case with the jurors, the jury as a whole was likely to afford greater credibility to the testimony of the deputy sheriffs on the vital question of the voluntariness of the defendant's confession, than they would have, had the jury not been permitted the intimate association with these witnesses during the course of the trial. Under these circumstances, this Court held due process had been denied without the necessity of showing specific prejudice.

Further, in *Turner*, the defendant's counsel made timely motions for a mistrial on the basis that the deputy sheriffs' close association with the jurors had prejudiced the defendant. The issue was again raised on the direct appeal, that the close contact between the two witnesses and the jurors throughout the course of the trial had denied the defendant due process of law as protected by the Fourteenth Amendment.

In the petitioner's case, the bailiff was not a witness at the trial. He was not in a position to know any more about the facts of the case than were the jurors themselves. The statements of the bailiff were not *evidence* and it is unreasonable to conclude that any juror hearing the statements would give any probative value to the bailiff's remarks.

The Supreme Court of Oregon in refusing to permit the two jurors to impeach the jury's verdict, relied upon this Court's decision in *McDonald v. Pless*, 238 U.S. 264, 267 (1915). In that case this Court made the following

statement which is particularly appropriate to the facts in this case:

> ". . . But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."

The evils of permitting jurors to attempt to impeach their verdict was made convincingly clear at the post-conviction trial in this case. The petitioner was granted a new trial by the post-conviction trial court, not because there was any showing that the petitioner was prejudiced by the bailiff's comments, but because one of the regular jurors and an alternate juror were dissatisfied with the verdict. Since this was a collateral attack, the Supreme Court of Oregon merely refused to set the conviction aside absent any showing of prejudice which would have denied the petitioner his constitutional right to a fair trial by an impartial jury.

The similarity between the *Turner* case and this case is only superficial. There is a vast difference between holding that due process requires that the prosecution not be permitted to have their principal witnesses closely

associate with the jury during the course of the trial, and to state that due process permits a disappointed defendant to seek out jurors in the hope of finding some who are willing to impeach their verdict.

## CONCLUSION

The Supreme Court of Oregon was correct in holding that the petitioner had failed to show that there had been a substantial denial of petitioner's constitutional rights in view of the evidence before it.

For the foregoing reason, the writ of certiorari should be denied.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General of Oregon

WAYNE M. THOMPSON
Assistant Attorney General
Supreme Court Building
Salem, Oregon 97310
Tel. 364-2171, ext. 315, 358
Attorney for Respondent

# APPENDIX

## CONSTITUTIONAL PROVISIONS AND STATUTES

### CONSTITUTION OF OREGON, ARTICLE I

Section 11. **Rights of accused in criminal prosecution.** In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

### OREGON REVISED STATUTES:

17.305. **Deliberations of jury; custody of and communications with jury.** After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together, separate

from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions to the utmost of his ability.

138.530. **When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected.** (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959,

under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court in habeas corpus as provided in the Constitution of this state.